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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 79-5903

H. L., et al.,

Appellants,

vs.

SCOTT M. MATHESON, et al.,

Appellees.

Appeal from the Judgment of the Supreme Court of the State of Utah

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BRIEF OF COALITION FOR THE MEDICAL RIGHTS OF WOMEN, CHINATOWN-NORTH BEACH FAMILY PLANNING SERVICES, INC., AND JUVENILE LAW SECTION OF THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION AS AMICI CURIAE IN SUPPORT OF APPELLANTS.

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BRIEF OF COALITION FOR THE MEDICAL RIGHTS OF WOMEN, CHINATOWN-NORTH BEACH FAMILY PLANNING SERVICES, INC., AND JUVENILE LAW SECTION OF THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION AS AMICI CURIAE IN SUPPORT OF APPELLANTS.

INTEREST OF AMICI CURIAE*

The Coalition for the Medical Rights of Women is a not-for-profit statewide association of more than 150 California organizations, including patient advocate groups, organizations dedicated to securing and advancing the rights of women, and organizations concerned with caring for women in problems relating to their reproductive capacity. Additionally, the Coalition's membership includes pediatricians specializing in care of adolescent women, as well as over 2500 individuals, many of whom have sought and obtained abortions in the past, and may do so in the future, and many of whom have daughters in and approaching adolescence who either have had or may need to have abortions. The Coalition's goal in all its work is to ensure that all women, young as well as old, are enabled to make informed and unfettered decisions about their reproductive capacity, and are able to receive the best possible medical care to implement their choices. The Coalition works to secure safe and effective birth control, freedom from coerced sterilization, prenatal care, access to childcare facilities and to adequate care for new mothers and their infants, as well as access to skilled medical care to terminate unwanted pregnancies. Through its

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* Written consent for the filing of this Brief Amici Curiae in the form of a stipulation by counsel for Appellants and for Appellees, pursuant to Supreme Court Rule 42(2), has been filed with the Clerk of this Court under separate cover.

sterilization abuse program, the Coalition works to protect young women against parental decisions which could result in sterilization without their informed consent; through its Committee to Defend Reproductive Rights, the Coalition seeks to protect all women, including teenagers, from legislation which would intrude upon the right to choose freely whether or not to bear children.

Amicus Chinatown-North Beach Family Planning Services, Inc., is a California clinic serving primarily San Francisco's Chinese-speaking community. Its staff provides bilingual family planning assistance, counselling, and educational materials to adults and teenagers, and also refers many people who contact the clinic to other agencies, physicians, and clinics in the Bay Area. Many of its clients are teenage women who have in the past needed abortions or who will need them in the future; many of its adult clients have teenage daughters who have had or will need to have abortions. A mandatory parent notification requirement would seriously impair the ability of this clinic to serve its clientele fully and appropriately.

Both the Coalition for Medical Rights of Women and Chinatown-North Beach Family Planning Services, Inc., are appellants in a case pending in the California Supreme Court, entitled Committee to Defend Reproductive Rights v. Myers, (S.F. No. 24069, Petition For Hearing filed July 9, 1979). Among the issues pending

for resolution by that court is whether a requirement that the parents of pregnant minors in the State of California must be notified before a publicly-funded abortion can be performed constitutes a violation of the minors' privacy rights. This Court's disposition of the instant case is likely to have a profound, perhaps dispositive effect upon the pending California appeal.

The National Legal Aid and Defender Association (NLADA) is a not-for-profit organization whose primary purpose is to assist in providing effective legal services to persons unable to retain counsel; amicus NLADA Juvenile Law Section is the division of NLADA which is concerned with the rights of minors. NLADA's members include the great majority of legal services agencies throughout the United States, public defender offices, and coordinated assigned counsel systems. NLADA's membership also includes two thousand individual members, most of whom are private practitioners. In its attempt to provide effective legal services to the poor, NLADA necessarily must defend against governmental attempts to limit the reach of constitutional protections, because it is always the poor who are most immediately affected by such incursions, and who are least able to defend against them. Teenagers, who rarely have independent financial resources, are a significant client group of NLADA's members. Because the primary purpose of NLADA is to ensure that those without financial resources have access to

equal justice, the NLADA Juvenile Law Section, on behalf of the clients of its members, has a unique interest in ensuring that the government not act to deprive teenagers of free access to rights secured by the Constitution, including the right of privacy. Moreover, since NLADA members would be the principal resource for pregnant teenagers who might be obliged to secure legal counsel in order to obtain an abortion which their parents oppose, and since the Juvenile Law Section of NLADA is acutely aware of the unavailability of sufficient legal counsel resources for such teenagers in many parts of the country, amicus NLADA Juvenile Law Section has a specific interest in ensuring that obstacles not be interposed which, directly or indirectly, might require pregnant teenagers to resort to court proceedings in order to obtain abortions.

Amici Curiae thus bring to this action a thorough familiarity with the issues in this case as well as in similar cases. Amici believe that the issues raised in this case present important questions of national significance, questions which are of concern to young girls everywhere, not only to those in Utah. Amici believe that by their participation in this action they can bring before this Court considerations which will assist the Court in deciding the important questions raised by this appeal.

SUMMARY OF ARGUMENT

Mandatory parental notification in every case where a minor seeks an abortion violates pregnant minors' right of privacy, which includes the right to decide to terminate a pregnancy by abortion, free of unwarranted state intrusion. This privacy right extends to minors as well as adults. Both aspects of the privacy right, the interest in avoiding disclosure of sensitive matters and the interest in independent decision-making, are burdened by mandatory parental notification.

For many pregnant teenagers who do not wish their parents to know of their abortion, the requirement of notification is indistinguishable in its impact from a requirement of consent. A significant number of minors will suffer substantial harms rather than permit their parents to be notified. The technical impairment of the privacy interest occasioned by mandatory disclosure is exacerbated by the harm which may result to the minor and to the family from disclosure. Moreover, a pregnant minor's interest in independent decision-making may be undermined where parents exert psychological pressure against abortion, or where they take practical steps to impede her ability to obtain an abortion.

Even though the notice requirement may deter only some pregnant minors from exercise of their right to choose a safe, lawful abortion, a

less than absolute barrier which significantly burdens the right to decide whether to bear children is still unconstitutional. Moreover, the Utah statute does interpose an absolute barrier in the form of criminal penalties for physicians unless notification takes place prior to the abortion.

The notice requirement also will deprive some minors of the opportunity to obtain necessary medical care. Some will remain pregnant; others may delay seeking abortion, seek it through illegal channels, attempt self-abortion or suicide, or run away. Whether or not each individual is correct in her judgment that suffering these risks is preferable to notifying her parents is immaterial in terms of the harm actually worked by the notice requirement.

The Utah notice requirement also deprives pregnant minors seeking abortions of the equal protection of the law. Utah discriminates arbitrarily between minors who seek therapeutic abortions and minors who seek all other pregnancy-related care, requiring only those who want abortions to disclose their situation to their parents. This distinction is irrational and underinclusive, because childbearing is acknowledged to present significantly greater risks to the health and welfare of minors than early abortion. Moreover, teenagers carrying their pregnancies to term are permitted by Utah law to consent to procedures far more dangerous than early abortion, and to give birth to new

life, without any notice to parents. Also, the law distinguishes irrationally between married and unmarried pregnant minors. The ostensible purpose of the notice requirement is to enhance medical judgment, but the aribtrary distinctions drawn by the statute suggest that the notice requirement actually has little to do with that purpose.

Both the burden on minors' privacy rights with respect to abortion, and the denial of equal protection involved in the statute's classifications, give rise to a very stringent standard of constitutional scrutiny. The state must show that the notice requirement serves a significant state interest not present in the case of an adult, that the restriction actually furthers the interest, and that the interest cannot be furthered by less intrusive measures. The Utah law cannot meet this stringent standard.

The reasons justifying somewhat lesser scrutiny of infringements upon the privacy rights of minors than upon those of adults are concerned almost exclusively with advancing the welfare of those minors. Thus, to be sufficient justification for the notice requirement, the interest or interests advanced by the State of Utah must relate to enhancing the health and welfare of the minor, and must actually be furthered by the notice requirement. Each of the interests which might be suggested in defense of the Utah statute is deficient in at

least one of these respects.

First, the interest in assuring that minors make the abortion decision carefully is not advanced by the notice requirements. Mature minors who are capable of making the abortion decision independently are already engaging in responsible decision-making. Minors who are deterred by the notice requirement from seeking abortion through legal channels will not seek out their parents for consultation; the result of the requirement is exactly the opposite of encouraging responsible decision-making by pregnant minors. Those whose parents, once notified, react with hostility or violence will not be aided thereby in the process of making a weighty and difficult decision. Minors who are deterred from obtaining medically desirable abortions will be harmed in many ways by the requirement; those who refuse to notify their parents, but still persist in seeking an abortion, also suffer substantial harm as a result of the notification requirement. The state can have no interest in encouraging parent consultation regarding the abortion decision when the result is harm to the health and welfare of many pregnant teenagers.

Second, the notice requirement fails to advance the interest of parents in guiding the upbringing of their children. No autonomous parental interest unrelated to the minors' welfare can constitute sufficient justification for the notice requirement when the result of notice

will be detrimental to the health and welfare of minors in many instances. The weighty parental interest in promoting the health or welfare of the minor is frustrated rather than served by the requirement in an appreciable number of cases.

Finally, the notification requirement fails to advance the physician's best medical judgment. The terms of the statute do not require that the physician receive any information whatever from parents. Moreover, notification as the price of medical care will impair the trust essential for a successful physician-patient relationship and prevent delivery of high-quality medical care. Also, a physician whose medical judgment is that a minor will be harmed by parental notification is rendered powerless by the statute to exercise any medical judgment at all.

Existing provisions of Utah law, professional standards, and constitutional safeguards of parental rights are more than adequate to ensure that a teenager's decision to have an abortion will be a careful one. Utah law requires that physicians consider a broad range of factors, provide extensive information, and satisfy themselves that consent is truly informed, prior to performing an abortion. The provisions of existing law and professional standards are sufficient to protect the immature minor as well as the mature minor. The constitutional protections afforded the parental

interest in childrearing ensure that parents can have as much input as they desire into their children's thinking about pregnancy and abortion. Additional provisions to ensure responsible decision-making by pregnant teenagers are, in the view of amici, unnecessary.

Mandatory notification of parents in every case is a sledge-hammer approach. The Utah legislature could, if it wished, enact alternative provisions which would not unduly burden the privacy right of minors and which would further the state's important goals of improved adolescent decision-making, parental involvement in an important decision, and enhanced medical judgment. One such alternative approach is suggested in the Juvenile Justice Standards adopted by the American Bar Association. The approach taken by the Standards preserves the essentially medical nature of the abortion decision and extends as much protection as possible, consistent with the protection of her health, to the minor's privacy rights, while nevertheless encouraging, as opposed to requiring, parental involvement. Where less intrusive means exist to further important state interests, the Constitution does not permit the type of wholesale invasion of minors' privacy rights which the Utah mandatory requirement of parental notification creates.

ARGUMENT

I. THE PRIVACY RIGHT OF MINORS IS SUBSTANTIALLY INFRINGED BY A MANDATORY REQUIREMENT OF PARENTAL NOTIFICATION WHICH APPLIES IN EVERY CASE OF A MINOR SEEKING AN ABORTION.

A. The Right of Privacy Concerning the Decision Whether to Bear a Child or Terminate a Pregnancy Extends to Children as Well as Adults.

One aspect of the liberty protected by the Due Process Clause of the Fourteenth Amendment is the right of privacy 1 / which, as this Court has definitively recognized, encompasses the right to decide whether to bear or beget a child. Roe v. Wade, 410 U.S. 113 (1973); Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965). The right has been explicitly interpreted by this Court to include the right to decide to terminate a pregnancy by abortion, free from

1 / The right of privacy is not, of course, a unitary right; nor is it grounded solely in the Due Process Clause of the Fourteenth Amendment; it emerges from the shadows and penumbras of numerous constitutional clauses and amendments. L.Tribe, American Constitutional Law at 893 (1978). Whether it is a single right or a cluster of constitutionally protected interests, however, privacy concerns some of the most basic and intimate needs of human beings for autonomy and control of their own bodies. Id. at 889, 921.

unwarranted government intrusion. 2/ Roe v. Wade, 410 U.S. at 154. With respect to decisions regarding procreation, and specifically the abortion decision, the right of privacy has been held to extend to minors as well as adults. Bellotti v. Baird, 99 S.Ct. 3035 (1979) [hereinafter Bellotti II]; Carey; supra, Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976) [hereinafter Danforth]; Bellotti v. Baird, 428 U.S. 132 (1976) [hereinafter Bellotti I].

The right of privacy encompasses two distinct, though closely related interests: the individual interest in avoiding disclosure of sensitive matters, and the interest in independence in making certain kinds of important decisions. Whalen v. Roe, 429 U.S. 589, 599-600 (1977). From the perspective of a pregnant teenager who wishes to have an abortion, both of these interests are implicated by a mandatory

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2/ The right in question is, essentially, a right to choose—to decide whether to seek an abortion or bear a child—rather than a right to an abortion as such. As succinctly stated by this Court in Carey v. Population Services International, 431 U.S. 678 (1977) [hereinafter Carey], "The decision whether or not to beget or bear a child is at the very heart of [the] cluster of constitutionally protected choices. That decision holds a particularly important place in the history of the right of privacy[.]" 431 U.S. at 685.

requirement that her parents receive notice of her decision to terminate her pregnancy. 3 / Compulsory notice to parents deprives a minor of the right to decide to whom and under what circumstances the fact of her pregnancy will be revealed, and further subjects her to a serious risk that her autonomy in decision-making will be limited. While certain intrusions upon the

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3 / Utah law provides that

> no abortion may be performed in this State without the concurrence of the attending physician, based on his best medical judgment[,]

Utah Code Ann. §76-7-303 (1978), and that

> To enable the physician to exercise his best medical judgment, he shall:
> (1) Consider all factors relevant to the well-being of the woman upon whom the abortion is to be performed, including, but not limited to,
>
> (a) Her physical, emotional and psychological health and safety,
> (b) Her age,
> (c) Her familial situation.
>
> (2) Notify, if possible, the parents or guardian of the woman upon whom the abortion is to be performed, if she is a minor, or the husband of the woman if she is married[,]

Utah Code Ann. §76-7-304 (1978), and imposes criminal penalties upon the physician for performing an abortion upon a minor without giving the required notice to her parents. Utah Code Ann. §§76-7-314(3); 76-3-204(1); 76-3-301(3) (1978).

constitutional rights of children have been viewed by this Court as permissible, 4 / it is nonetheless established that infringements of minors' right of privacy, particularly when the interests affected involve a decision to obtain an abortion, will not withstand constitutional scrutiny if they constitute an undue burden upon the right. Bellotti II, 99 S.Ct. at 3046; Bellotti I, 428 U.S. at 148. Amici will demonstrate that mandatory parental notification creates just such an undue burden.

B. A Mandatory Requirement of Parental Notification for Abortions Performed Upon Minors Significantly Burdens Their Right of Privacy.

From the perspective of a pregnant teenager who has decided, in consultation with a physician, to obtain an abortion, a requirement of parental notification is virtually indistinguishable from a requirement of parental consent. 5/ Confronted with the necessity for involving their parents as the price of securing an abortion, an unknown but significant number of minors in this category will prefer to suffer substantial harms rather than permit their

4 / See, e.g., Bellotti II, 99 S.Ct. at 3044; Carey, 431 U.S. at 693, n. 15.

5/ Footnote on next page.

parents to be informed. 6 /

For a variety of reasons, some pregnant teenagers are simply unwilling, under any circumstances, to have their parents know that

5 / In considering the requirement of mandatory parental notification, it is useful to divide the affected pregnant teenagers into three groups: (1) those who would not mind if their parents were informed; (2) those who object to notification and presume correctly that their parents would be hostile or unsupportive; and (3) those who incorrectly presume that their parents will be unsupportive but who are adamant in their refusal to risk parental knowledge. It is the latter group which highlights most clearly the manner in which a notice requirement is virtually indistinguishable from a consent requirement. For the minor who will go to any lengths to avoid notification to her parents, neither the fact that in some ultimate legal sense the "decision" is hers, nor the fact that her parents in actuality would be supportive is particularly relevant. The notification requirement will be as insuperable an obstacle to her access to an abortion as the "absolute limitation on the minor's right to obtain an abortion" which constitutes the fatal defect of a consent requirement. Danforth, 428 U.S. at 90. (Stewart, J., concurring).

6 / The Utah statute imposes no duty upon a physician to notify parents unless he or she intends to perform an abortion. Hence, by foregoing the safe, legal abortion the minor could avoid the necessity for notifying her parents.

they are pregnant, 7 / or that they have decided to have an abortion. Others may be less concerned about the fact of knowledge but will, correctly or incorrectly, assume that if their parents were to learn of their decision to have an abortion they would exert extreme pressure, or take decisive action, to prevent the abortion. For these two groups of pregnant teenagers at least one of the privacy interests—in non-disclosure of personal information or in

7 / It is obviously true that minors who are deterred by the notice requirement from obtaining abortions will be caught in a Catch-22: as pregnancy advances, their parents will learn of their pregnancy without formal notification. But, because of their stage of cognitive development, some minors may not be able to think through the logical implications of each course of action. See, Cobliner, Shulman, and Romney, The Termination of Out-of Wedlock Pregnancies and the Prospects for their Primary Prevention, 115 Am.J.Obstet.Gynecol. 432, 442 (1973). Whether or not their avoidance of abortion under these circumstances is entirely rational, the deterrent effect of the notice requirement is nevertheless real. By no means all minor females fall into this group; many are perfectly mature, and able to exercise rational decision-making about their predicaments. Some of these will be willing to inform their parents of their pregnancies; others may recognize and accept that unless they notify their parents about the desired abortion, the parents will discover the pregnancy in any event after abortion is no longer a feasible alternative; still others may justifiably conclude that the risks attendant upon notification are not worth encountering, even compared with the risks of other alternatives. See infra at 23, n.18.

independent decision-making—is implicated, and, as amici will demonstrate, substantially infringed.

The infringement of the privacy interest in non-disclosure occasioned by the mandatory notice requirement is complete: a minor who wishes to obtain the abortion must accede to notifying her parents. The harm represented by even a technical impairment of the privacy interest which would result from unwilling disclosure may well be exacerbated by the impact of the disclosure upon the family relationship. This Court noted in Danforth that "the very existence of the pregnancy" could be responsible for fracturing the family structure, 428 U.S. at 75, and thus implicitly recognized that serious harms may result to the minor and to the family 8 / as a consequence of the violation of the minor's privacy interest in non-disclosure. See also, Bellotti II, 99 S.Ct. at 3048; Baird v. Bellotti, 450 F.Supp. 997, 1001 (1978),

8 / In a recent opinion holding unconstitutional Louisiana's requirement of parental notification for minors of ages fifteen to seventeen who seek abortions, one judge recognized: "In many cases the notice requirement will cause family disharmony because it will inform parents who may oppose their daughter obtaining an abortion, yet those parents will be legally powerless to prevent their daughter from obtaining an abortion." Margaret S. v. Edwards, ___ F.Supp. ___, No. 78-2765, Slip op. at 25 (E. D. La. Feb. 29, 1980).

aff'd, 99 S.Ct. at 3035 (1979) (hereinafter Baird); Wynn v. Carey, 582 F.2d 1375, 1388, n. 24 (7th Cir. 1978).

The other aspect of the privacy interest—that which insures independence in making certain kinds of important decisions, Whalen v. Roe, 429 U.S. at 599-600—is also implicated, and burdened, by the mandatory parental notice requirement. This Court has recently recognized that practical limitations on minors' capacity to consent to abortion are inherent in a parental notification requirement which applies in every case:

> ... [M]any parents hold strong views on the subject of abortion, and young pregnant minors, especially those living at home, are particularly vulnerable to their parents' efforts to obstruct both an abortion and their access to court.
>
> Bellotti II, 99 S.Ct. at 3050.

The prerogatives of parental authority may make it difficult, if not impossible, for many minors to effectuate an abortion decision, once their parents have learned of their intent to do so. Parents can exert psychological and emotional pressure, threatening ostracism from the family, for example, if the daughter persists with her chosen course of action; they can also take practical steps to prevent her obtaining the abortion for which she has the legal right to consent. By committing a pregnant daughter to a

mental hospital 9 / or sending her to a boarding school or away to visit relatives, parents might be able to delay or totally prevent an abortion; similarly, they may, by restricting the availability of funds, prevent her from reaching a clinic or hospital. Amici do not mean to suggest that all parents will act in such a harsh or unreasonable manner. Many will not do so, and many will be helpful and supportive to their daughters in a time of stress. Amici are not concerned with those cases, however, but rather with the cases, which undeniably exist, in which the risk of harm which would result from the impairment of the privacy interest in independent decision-making is great.

The fact that a mandatory requirement of parental notification is not an explicit authorization of a parental veto does not prevent it from being an undue burden on the right of pregnant minors to choose whether to bear children. Restrictions on the exercise of a fundamental right which are less than absolute may nevertheless constitute impermissible infringements of the right. 10/ Thus, the fact that the notification requirement will constitute a

9 / Parents generally have the right to commit their children to mental facilities. See e.g., Ellis, Volunteering Children: Parental Commitment of Minors to Mental Institutions, 62 Cal. L.Rev. 840, 850 (1974).

10/ Footnote on next page.

deterrent to abortion for only some, rather than all, pregnant teenagers, does not enhance its constitutionality. In Danforth, for example, not every parent would have exercised the arbitrary veto power and withheld consent; nevertheless the fact that some would have done so rendered the requirement unconstitutional. And there can be little doubt that at least some minors will be deterred by Utah's mandatory notice statute from seeking medical care or obtaining an abortion. 11/ Moreover, there is a significant aspect of the Utah statute which does constitute a total restriction upon the minors privacy right; it interposes an absolute

10/ As this Court stated in Carey:

> [L]ess than total restrictions on access to contraceptives that significantly burden the right to decide whether to bear children must also pass constitutional scrutiny.
>
> 431 U.S. at 697.

11/ Commenting upon mandatory parental consultation as an alternative to a parental veto power, the U.S. Court of Appeals for the Fifth Circuit concluded that:

> . . . merely facing one's parents with the problems of unwanted pregnancy would present a considerable deterrent to abortion among teenage girls and, in fact, may adversely affect their mental and physical health and thereby arguably infringe upon the minor's constitutional rights.
>
> Poe v. Gerstein, 517 F.2d 787, 793, n.11 (5th Cir. 1975).

barrier to abortion, in the form of criminal penalties imposed upon physicians, unless a minor is willing to permit notification. 12/

Not only does the requirement of parental notice impinge upon the minor's privacy interest by compelling disclosure of personal information and by limiting the minor's ability to make an important decision independently, it may also deprive the minor of the opportunity to obtain necessary medical care. 13/ Many minors, out of fear of parental involvement for the various reasons discussed above, will avoid seeking medical care through legitimate channels when

12/ Thus, one way of viewing the burden on minors' privacy rights imposed by the Utah requirement is that deterrence of abortion, and therefore childbirth by default, are significant and foreseeable results of Utah law, secured not permissibly, through use of incentives, c.f. Maher v. Roe, 432 U.S. 464, 474 (1977) ["The State may have made childbirth a more attractive alternative, thereby influencing the woman's decision, but it has imposed no restriction on access to abortions that was not already there."], but impermissibly, through state-imposed criminal penalties.

13/ Minors may well have a constitutionally protected liberty interest in access to medical care to preserve and enhance their health. This interest, which at least in this instance requires for its effectuation the ability to consult with a physician in strict confidentiality, would thus be infringed by the notice requirement. The impairment of the minor's liberty interest in health would also impinge upon the physician's professional duty of confi-

they discover or suspect that they are pregnant; 14/ others may delay in seeking medical care, 15/ seek it through illegal channels or undergo extreme health risks by attempting to abort themselves: 16/

13, cont'd./
dentiality. See infra at 47. The need to apply the professional duty of maintaining confidentiality to physicians' relationships with children as well as with adults has been widely recognized. See, e.g., Gallagher, The Care of Adolescents, in Medical Care of the Adolescent at 64 (3d ed. 1977); Perr, Confidentiality and Consent in Psychiatric Treatment of Minors, 4 Journal of Legal Medicine 9, 12 (June 1976); A. Hodder, Legal Issues in Pediatrics and Adolescent Medicine at 144 (1977). There is, therefore, a close relationship between the privacy interests of minors, the dictates of professional ethics with respect to confidentiality, and the ability of the physician to provide timely, appropriate, high quality medical care to a minor patient, particularly in an area as sensitive as pregnancy and abortion.

14/ See, e.g. Alice v. SDSW, 55 Cal.App.3d 1039, 128 Cal.Rptr. 374 (1976).

15/ See, Bracken and Kasl, Delay in Seeking Induced Abortion: A Review and Theoretical Analysis, 121 Am. J. Obstet. and Gynecol. 1008, 1013 (1975).

16/ See also, Paul, Pilpel, and Wechsler, Pregnancy, Teenagers and the Law, 1974, 6 Fam. Plan. Perspectives 142, 145 (1974).

> The consequences of refusal to perform an abortion on a minor may be very serious, since a girl who is intent on abortion is quite likely, if denied one by a physician, to turn to an illegal abortionist or attempt to abort herself. Either action may have serious, possibly life-threatening effects. A. Hodder, supra, at 285.

In short, amici submit, the burden on the privacy right of minors which results from the notice requirement is substantial. Some minors who are mature enough to become pregnant, and able under Utah law to consent to an abortion, are nonetheless concerned above all else that their parents not learn of their pregnancies. 17/ Some of these teenagers are correctly assessing a hostile, abusive, or otherwise unsupportive response to be likely from their parents. 18/ Others incorrectly fear such a response. Some of the latter are relatively mature, and some are not. But for all of them, the subjective perception is the

17/ See, Baird v. Bellotti, 393 F.Supp. 847, 853 (1975), vacated and remanded, 428 U.S.132 (1976).

18/ See, e.g., State v. Koome, 84 Wash.2d 901, 530 P.2d 960 (1975) [parents wished to deter daughter from subsequent pregnancies by forcing her to bear child]; Jolly, Young, Female and Outside the Law, in Teenage Women in the Juvenile Justice System: Changing Values at 102 (1979) ["When a young girl becomes pregnant, many families refuse to allow her back into their home . . . Institutionalization is all too often the only available alternative . . ."];

same: they will not permit their parents to be notified, and either they are paralyzed into inertia by their dilemma, thus delaying abortion until it is no longer a safe choice, or they believe the various alternatives—running away, suicide, self abortion, back-alley abortions (all of which are far more dangerous than an early therapeutic abortion) to be preferable to informing their parents. Utah law permits them to make this decision. Indeed, for girls in this position (and common sense and available studies indicate that the size of the group is far from negligible)—Utah law virtually dictates that they will endure a more dangerous alternative than a safe abortion, with no adult guidance at all in making that choice.

For these girls the right of privacy is unquestionably infringed. 19/.

18/ cont'd
cf. Sparkman v. McFarlin, 552 F.2d 172 (7th Cir. 1977), rev'd sub nom. Stump v. Sparkman, 435 U.S. 349 (1978), rehearing denied, 436 U.S. 951 (1978) [mother sought and obtained order authorizing sterilization of fifteen-year old daughter to prevent possible pregnancy].

19/ The various ways in which this infringement occurs were recently documented on the record in a recent case invalidating a parental notice requirement similar to Utah's. Women's Community Health Center, Inc. v. Cohen, 477 F.Supp. 542, 548 (D.Maine 1979).

II. THE UTAH PARENTAL NOTIFICATION STATUTE CREATES CLASSIFICATIONS WHICH DISCRIMINATE ARBITRARILY BETWEEN SIMILARLY-SITUATED PREGNANT MINORS IN THEIR EXERCISE OF A FUNDAMENTAL RIGHT.

Utah law permits female minors of any age or marital status to consent to any medical care which is given in connection with pregnancy or childbirth, including abortion. Utah Code Ann. §78-14-5(4)(f) (1953). However, the requirement of mandatory notice to parents, which is superimposed upon this basic scheme only for minors who seek abortions, sets up a classification which arbitrarily separates minors who seek therapeutic abortion from minors who seek all other pregnancy-related medical care. Utah Code Ann. §76-7-304(2) (1978). The effect of this statutory classification is to burden substantially the exercise of the fundamental privacy right of pregnant minors to decide for themselves whether or not to bear children; as will be shown below, (Point IV, infra, at 35-48), no significant state interest is advanced by the classification which outweighs the extreme detriment to the fundamental interests of pregnant minors which amici have shown the notice requirement to work in a significant proportion of cases. The statute thus unconstitutionally denies unmarried pregnant minors seeking abortions the equal protection of the laws.

The code provision is vastly underinclusive. First, Utah's law does not require physicians to notify the parents of pregnant

minors who consent to any aspect of pregnancy-related care other than abortion. It is generally agreed that from both a medical and a socio-economic point of view, childbearing presents more severe risks of harm to teenage mothers than to older women, 20/ and is commonly more dangerous to maternal health than first trimester abortion. Nonetheless, the physician is not directed by Utah law to notify parents of young women who choose childbirth over abortion, even though their choice may run directly contrary to the physician's best medical judgment, and even though many parents might ally themselves with the physician in this situation to urge that their daughters consider abortion more carefully. 21/

20/ See infra at 39-41.

21/ Amici do not believe that the decision to undergo abortion is any weightier than the decision of a young woman, herself possibly still a child, to give birth to new life, and on that ground, urge this Court to reject as irrational a statutory scheme which deters the former choice while in effect encouraging the latter. Consider, for instance, the absurd reality that under Utah law a hypothetical eleven-year old girl who, deterred from an early abortion by the notification requirement, gives birth to a child--without any parental involvement in that decision--is at the moment of birth empowered by Utah law to make all decisions, medical and otherwise for that new being, Utah Code Ann. §78-14-5(4)(a) (1953), a mere nine months after the state of Utah has statutorily refused her the means to implement a decision on her own part not to assume such responsibility over another being's life, unless she first notifies her own parents.

Second, many young women who carry pregnancies beyond the point of safe early abortion experience medical conditions requiring interventions far more dangerous and intrusive from a medical standpoint than early abortion. 22/ Under Utah law, a pregnant minor of any age can consent, for example, to amniocentesis, Caesarean section delivery, fetal monitoring devices, as well as care for spontaneous abortion and miscarriage, toxemia, placenta previa, ectopic pregnancy, and a variety of other high-risk medical conditions without any notification to her parents that such treatment is taking place. Surely, if parental notice in all cases were thought to be necessary to ensure sound medical judgment where abortion is contemplated, the same considerations would apply even more strongly to these other forms of medical care involving far greater risk of harm. 23/

22/ See, e.g., Alan Guttmacher Institute, 11 Million Teenagers, at 21-23, 62 (1976).

23/ The analysis presented in this section focuses on the irrationality of the Utah notice requirement in terms of an asserted legislative purpose of enhancing the physician's medical judgment, because this purpose is the only one which appears on the face of the statute. Other possible state purposes—some asserted by respondents below, others not, to amici's knowledge, asserted by the State of Utah in justification of the statute—are analyzed below, Point IV, infra, at 37-45, and shown to be insufficient to justify the burden upon the privacy rights of pregnant teenagers.

Third, the Utah code distinguishes between married and unmarried pregnant minors in a wholly irrational manner. Utah Code Ann. §76-7-304(2) (1978). 24/ Utah law would require a sixteen-year old girl who is unwed and who desires an abortion to involve her parents in the fact of her pregnancy and abortion, while a sixteen-year old girl, otherwise identically situated, who is married need not have her parents notified. 25/ Instead, the law mandates notice to her husband, without reference to how young he may be. Whatever the actual

24/ The statute is somewhat ambiguous in drawing the distinction. It is unclear whether, for a married pregnant minor seeking abortion, the physician is mandated to notify the husband instead of the parents, or whether the physician is left to choose between notifying the parents and notifying the husband. In either case, the distinction between married and unmarried minors discriminates arbitrarily. Marital status has been held by this Court to be an impermissible basis upon which to impose burdens upon the right of privacy in matters related to procreative choice. Eisenstadt v. Baird, 405 U.S. at 453.

25/ Even though a young woman who is married obviously has no reason to keep private the fact that she is sexually active, she may well wish her parents not to know of an intended abortion, because of an anticipated negative reaction or outright opposition. She may wish to protect the parents or herself from the resulting emotional stress; she may even fear obstruction of her plans, if, for example, she is still economically dependent despite her marriage.

purpose behind this distinction may be, it cannot reasonably be construed to enhance the physician's medical judgment. Both hypothetical young women are identically situated with respect to a legislative presumption that the physician's medical judgment would somehow be improved by notification of parents. 26/ A husband who is possibly as young as the pregnant girl, and who may know nothing at all about her medical history, cannot reasonably be regarded as able to contribute to the exercise of the physician's medical judgment; yet the Utah law regards him as equivalent to the parent for this purpose. 27/ Utah's notification requirement, in short, is greatly underinclusive in terms of

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26/ Of course, there are many distinctions between married and unmarried minors, emancipation being perhaps the most obvious. However, Utah distinguishes between married and unmarried minor females for an ostensible purpose to which the fact of marriage is wholly unrelated: enhancing a physician's medical judgment. In a similar context, one court has observed, "The State's concern that a minor receive parental guidance about a prospective abortion is undermined when a significant segment of pregnant minors is not afforded that guidance. In short, the statute distinguishes between two classes of minors without any showing of justification for the distinction." Wynn v. Carey, 582 F.2d at 1387.

27/ This statutory equivalency assigned to parents and spouses strongly suggests that the actual purpose of the notification provision in reality has little to do with exercise of medical judgment. The only sense in which a juve-

its purported purpose to ensure that the physician is given an opportunity to receive information which might enhance a medical judgment about a teenager's abortion. 28/

The classifications set up by the notification requirement, then, discriminate arbitrarily and irrationally between various groups of pregnant minors in the exercise of their fundamental privacy rights. Amici will show that this arbitrary distinction gives rise to very stringent judicial scrutiny (Point III, infra, at 31-34), and that under such scrutiny, the requirement is fatally defective (Point IV and Point V, at 35-63).

27/ con't.
nile spouse of a pregnant girl can be considered similarly situated to her parents is with respect to his own personal interest in the unborn fetus, and his own personal feelings about abortion. Viewed in that light, neither his autonomous interest, nor that of the pregnant young woman's parents, is important enough to justify invasion of the pregnant girl's fundamental right to privacy, with the attendant serious harms. See Point IV, infra, at 39-41 and 43-44.

28/ The lack of connection between notice to parents and receipt of information from them is discussed infra, at 46-47.

III. BOTH THE BURDEN ON THE FUNDAMENTAL RIGHT OF PRIVACY, AND THE ARBITRARY DISCRIMINATION BETWEEN SIMILARLY SITUATED CLASSES OF MINORS WITH RESPECT TO EXERCISE OF THAT RIGHT, WHICH RESULT FROM THE UTAH PARENTAL NOTICE REQUIREMENT, GIVE RISE TO A VERY STRINGENT STANDARD OF CONSTITUTIONAL SCRUTINY.

Normally, an infringement of the fundamental right of privacy in the area of reproductive choice can only withstand constitutional scrutiny if it is necessary to further a compelling state interest. E.g., Roe v. Wade, 410 U.S. at 154; Carey, 431 U.S. at 688. In the case of minors, some deviation from the stringent standard of review required for adults is permissible. See, e.g., Carey, 431 U.S. at 693, n. 15. The test for determining the constitutionality of state regulation interfering with the privacy rights of minors in the area of pregnancy and abortion is whether the regulation serves a "significant state interest . . . that is not present in the case of an adult." Danforth, 428 U.S. at 75; Carey, 431 U.S. at 693.

It is not sufficient for the state merely to proffer in support of its restrictive legislation an appropriate state interest which is a significant one; it must also demonstrate that the restriction in question actually furthers that interest, and is narrowly drawn to serve only that interest:

> [W]hen a State, as here, burdens the exercise of a fundamental right, its attempt to justify that burden as a rational means for the accomplishment of some significant State policy requires more than a bare assertion, based on a conceded complete absence of supporting evidence, that the burden is connected to such a policy.
>
> Carey, 431 U.S. at 696.

This standard is a very stringent one. Applying it, this Court has invalidated every state statute presented to it in recent years which has significantly burdened the privacy rights of minors with respect to procreation. Bellotti II, supra; Carey, supra; Danforth, supra. Moreover, unusually careful scrutiny is required when the challenged restriction affects the ability of a minor to seek an abortion, since "the abortion decision differs in important ways from other decisions that may be made during minority." Bellotti II, 99 S.Ct. at 3047. Thus, in order to withstand this Court's stringent scrutiny, Utah's limitation upon the privacy rights of pregnant teenagers who wish to obtain abortions must demonstrably further a significant state policy which cannot be furthered by less intrusive measures; this, as amici will show, it cannot do.

Similarly, the basic framework for analysis of a claim that a statute fails to provide for the equal protection of law guaranteed by the Fourteenth Amendment is well settled:

> We must decide, first, whether [state legislation] operates to the disadvantage

> of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the constitution, thereby requiring strict judicial scrutiny.
> San Antonio Indep. School District v. Rodriguez, 411 U.S. 1, 17 (1973).

As amici have shown, a significant burden upon the fundamental right of privacy is imposed upon certain classes of minors by the Utah notification requirement. See supra, at 14-24. Consequently, this case technically falls within the criteria articulated in Rodriguez for application of strict judicial scrutiny. However, this Court has held, in the context of violations of the Due Process clause of the Fourteenth Amendment, that a significant state interest not present in the case of an adult may serve to justify a burden upon a minor's fundamental rights which might otherwise fail to survive the strictest scrutiny. Danforth, 428 U.S. at 75. But it is quite clear from this Court's opinion in Bellotti II, that while strictest judicial scrutiny may be somewhat relaxed in such a case, nonetheless burdens which as a practical matter impede a minor's ability to secure an abortion require extremely great justification. Where, as here, a denial of equal protection of the laws is asserted, the standard of review can surely be no less stringent.

Amici believe that the "significant state interest" test delineated in Danforth, and applied in Bellotti II, is substantially the same

as the "critical examination" which this Court brought to bear for equal protection purposes upon the state interests advanced in support of the statutory classification challenged in Zablocki v. Redhail, 434 U.S. 374, 383 (1978). Rather than seeking a "compelling state interest" to support the differential classification which burdened the fundamental right to decide to marry, this Court in Zablocki described the appropriate standard of review as follows:

> When a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests.
>
> 431 U.S. at 388.

Amici submit that this is the equal protection standard of review that should be applied here.

IV. NO STATE INTEREST CAN BE ADVANCED IN SUPPORT OF UTAH'S MANDATORY PARENTAL NOTIFICATION REQUIREMENT WHICH IS ADEQUATE TO JUSTIFY THE INTRUSIONS UPON THE PRIVACY RIGHTS OF PREGNANT MINORS

While a somewhat lesser standard of constitutional scrutiny may be required for invasion of the privacy rights of children than is required for intrusions on the similar rights of adults, it is equally clear that the rationale for permitting this lesser standard defines the type of state interests which may be advanced to justify such invasions. 29/ The state must advance an interest in support of the notice requirement which contributes significantly to the welfare of the minors affected by it. It would be absurd to suppose that any state interest unrelated to assuring the welfare of the pregnant teenager could provide a permissible justification for conditioning abortion on parental notification, since the reasons justifying limitations on constitutional rights of children—e.g. the vulnerability of children,

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29/ The reasons for permitting greater limitations on the constitutional rights of children than of adults have been most recently articulated as: "the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child-rearing." Bellotti II, 99 S.Ct. at 3043.

and the importance of assuring wise decision-making by or on behalf of minors—are concerned almost exclusively with the welfare of the children. 30/

Moreover, because the parental notification requirement is a limitation upon a minor's ability to obtain an abortion, the health of the minor must be the paramount consideration in evaluating any state interest proposed for its justification. 31/ Any state interest which does not further the health or welfare of pregnant teenagers who wish to obtain abortions will be inadequate to justify mandatory notice to their parents. Thus, in order to vindicate the notice requirement, a state interest must enhance the health and welfare of the minor, and must actually be furthered by the requirement. 32/ Amici will demonstrate that each of the

30/ "Where minors' rights have been held subject to curtailment by the state in excess of that permissible in the case of adults it has been because some peculiar state interest existed in the regulation and protection of children, not because the rights themselves are of some inferior kind." State v. Koome, 84 Wash.2d at 904, 530 P.2d at 263 (emphasis added).

31/ At no stage of pregnancy does any state interest, including its interest in the potential life of the fetus, outweigh the interest in maternal health. Roe v. Wade, 410 U.S. at 164-165.

32/ Carey, 431 U.S. at 696.

three legitimate state interests— assuring careful decision-making by a pregnant minor, 33/ fostering the parental role in childrearing, 34/ and enhancing the physician's best medical judgment 35/—which might be suggested in defense of the Utah statute is deficient in one of these respects.

A. The Mandatory Notice Requirement Does Not Serve the State's Interest in Assuring that Minors Make The Abortion Decision Carefully.

The assumption underlying the State's right to "limit the freedom of children to choose for themselves in the making of important affirmative choices with potentially serious consequences[,]" Bellotti II, 99 S.Ct. at 3044, is that minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them. Danforth, 428 U.S. at 102 (Stevens, J., concurring and dissenting). There are numerous ways, however, in which a mandatory requirement of parental notification, though it might be intended by the legislature to encourage parental consultation as an aid to responsible decision-making by the minor, is inappropriate for that purpose.

33/ Bellotti II, 99 S.Ct. at 3044.

34/ Id. at 3045.

35/ This ostensible purpose appears on the face of the statute itself. Utah Code Ann. §76-7-304 (1978).

Utah has already determined that the decision to obtain an abortion is the prerogative of the minor to make in consultation with her physician. Utah Code Ann. §78-14-5(4)(f) (1953). Thus, the state has already concluded that pregnant minors, in general, have the capacity to make the abortion decision with the assistance and advice of a physician. Accordingly, with respect to those minors who are mature, and capable of making the decision independently, the requirement of notice is unnecessary to achieve the state's interest in responsible decision-making. 36/

To the extent that minors are deterred from seeking abortion through legitimate channels, the notice requirement will not encourage them to turn to their parents for consultation and advice in making the abortion decision. On the contrary, they will run away, attempt self-abortion, seek out illegal abortions, commit suicide, or simply wait and do nothing, allowing the decision to be made by default. For that group the requirement will have had exactly the opposite of its intended effect. Moreover, in the case of those minors who do permit their parents to be notified, but whose

36/ To the extent that some individual minors are immature, or otherwise incapable of making the choice and giving effective consent to the surgery, the common law requirements of informed consent and the standards of the medical profession provide sufficient protections for the minor against her own immaturity or improvidence. See Point V, infra, at 49-52.

parents react with shock, hostility, anger, hysteria, or even violence, the requirement will not enhance the minor's decision-making process. An extreme and overwhelmingly negative parental response is very unlikely to aid the minor in the process of making a weighty and difficult decision.

As already noted, serious harms will result in those cases where minors are deterred from seeking medical care or where the parents are notified and take decisive action to prevent the abortion from occurring. 37/ Teenagers who bear children undergo elevated risks to their health as a result of pregnancy and childbirth. 38/ Additionally, the infants born to young teenage mothers are at greater risk of prematurity, low birthweight, and other developmental defects than those born to women in their twenties. 39/ Moreover, the social, psychological, and economic burdens attendant upon teenage motherhood are enormous and have been amply

37/ Bellotti II, 99 S.Ct. at 3048; Wynn v. Carey, 582 F.2d at 1388 n. 24; Women's Community Health Center, Inc. v. Cohen, 477 F.Supp. at 548; Baird, 450 F.Supp. at 1001-1003.

38/ See, e.g., Menken, The Health and Social Consequences of Teenage Childbearing, 4 Fam. Plan. Perspectives 45 (1972); Alan Guttmacher Institute, supra, at 22-23 (1976).

39/ See, e.g., Dott and Fort, Medical and Social Factors Affecting Early Teenage Pregnancy, 125 Am.J. Obstet. and Gynecol. 532 (1976).

documented. 40/ As this Court recognized in Bellotti II:

> [T]he potentially severe detriment facing a pregnant woman . . . is not mitigated by her minority. Indeed, considering her probable education, employment skills, financial resources, and emotional maturity, unwanted motherhood may be exceptionally burdensome for a minor. . . . In sum, there are few situations in which denying the minor the right to make an important decision will have consequences so grave and indelible.
>
> 99 S.Ct. at 3048.

The alternatives are equally bleak if the minor is unwilling to notify her parents but persists in her intention of having an abortion. She may delay in seeking the abortion until she can overcome her fear of disclosure to her parents; and each week of delay in obtaining an abortion occasions a 20% increase in the risk of complication and a 50% increase in the risk of death. 41/ Alternatively, she may attempt self-abortion or may seek out an illegal abor-

40/ See, e.g., Furstenberg, The Social Consequences of Teenage Parenthood, 8 Fam. Plan. Perspectives 148 (1976); Trussell, Economic Consequences of Teenage Childbearing, 8 Fam. Plan. Perspectives 184 (1976).

41/ See, e.g., Cates and Tietze, Standardized Mortality Rates Associated With Legal Abortion: United States, 1972-1975, 10 Fam. Plan. Perspectives 109 (1978).

tion, with potentially devastating consequences to her health or even perhaps her life. 42/ She may even be driven to commit suicide or to attempt it. 43/ It must be apparent from the foregoing that, except in those cases where the minor permits notice to her parents and they do provide helpful advice, the state interest in responsible decision-making is not furthered by the Utah statute; in each of the scenarios suggested, bad decisions would be made, at least partially as a result of the statute's imposition of a blanket notification requirement. The state cannot have an interest in encouraging parental consultation regarding the minor's abortion decision when the result of doing so would be harmful to the minor's health and welfare. 44/

42/ See, e.g., Baird, 450 F.Supp. at 1001; Hodder, supra, at 285; Poe v. Gerstein, 517 F.2d at 793, n. 11.

43/ See, e.g., Gabrielson, et al., Suicide Attempts in a Population Pregnant as Teenagers, 60 Am. J. Pub. Health 2289 (1970). The state must not be permitted to inflict childbirth, or the risk of death from illegal or self-abortion, upon teenage girls, in effect as a punishment either for their own fear of notifying their parents or for their parents' implacable opposition to abortion.

44/ Therefore, the requirement is impermissibly overbroad in that it requires notification in every case. Bellotti II, supra; Wynn v. Carey, supra; Akron Center for Reproductive Health v. City of Akron, 479 F.Supp. 1172 (N.D. Ohio

B. The Interest of Parents in Guiding the Upbringing of Their Children is Not Served by the Notification Requirement.

Parents have a substantial constitutional interest in directing the upbringing of their children, inculcating moral and religious values and preparing them for the responsibilities of adulthood. See, e.g., Wisconsin v. Yoder, 406 U.S. 205 (1972); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923). Nevertheless, in the context of the minor's abortion decision this parental interest is limited 45/ in two ways. First, "[a]ny independent interest which the parent may have in the termination of the minor daughter's preg-

44/ cont'd.
1979); Women's Community Health Center, Inc. v. Cohen, supra; Margaret S. v. Edwards, supra. The statute also, in effect, creates a conclusive presumption that all minors seeking abortions would benefit from consultation with their parents. Where, as here, such a presumption burdens the exercise of the fundamental right to choose whether to bear a child, it is constitutionally impermissible under Cleveland Board of Education v. LaFleur, 414 U.S. 632, 640 (1974).

45/ This Court's opinion in Bellotti II makes it indisputably clear that it is at bottom the state's concern with the well-being of the minor which is the necessary justification for state efforts to involve parents in the abortion decision: "parents. . .who have [the] primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility." 99 S.Ct. at 3046. (Citation omitted, emphasis added).

nancy is no more weighty than the right of privacy of the competent minor mature enough to have become pregnant." Danforth, 428 U.S. at 75. Second, parents cannot have a legitimate interest in restricting a minor's access to abortion where to do so would impose a substantial burden upon her health. 46/

The authority of parents over their children is by no means unlimited. See, e.g., Wisconsin v. Yoder, 406 U.S. at 234; Prince v. Massachusetts, 321 U.S. 158, 170 (1944). Because the harms which may result from teenage pregnancy and childbirth are so substantial, a successful parental attempt to discourage or prevent a daughter's abortion might very well "jeopardize the health and safety of the child, or have a potential for significant social burdens." Wisconsin v. Yoder, 406 U.S. at 234. It is under precisely those circumstances that parental authority may be limited. Some parents may try to deter a pregnant daughter from

46/ Comment, The Minor's Right to Consent to Medical Treatment: A Corollary of the Constitutional Right of Privacy, 48 So.Cal. L.Rev. 1417, 1439 (1975). The parental right to guide and control their children's upbringing does not include a right to injure them. L. Tribe, supra, 850-851, 935 (1978). This remains true even when parents wish to withhold consent for medical treatment based upon religious objections. See, e.g., In re Green, 448 Pa. 338, 292 A.2d 387 (1972); In re Sampson, 65 Misc.2d 658, 317 N.Y.S.2d 641 (Fam. Ct. 1970).

obtaining an abortion for insubstantial personal reasons of their own. 47/ That, of course, is not permissible. However, even more weighty parental interests must yield to the extent that they do not foster the minor's welfare. For example, parents' religious objections to abortion, no matter how fervent, cannot be given precedence over the child's own constitutional rights, when to do so would be to the detriment of the minor's health.

In short, there is no autonomous parental interest which could legitimately constitute sufficient justification for a mandatory parental notification requirement. 48/ and the

47/ For example, parents' desire for a grandchild, or to teach their daughter a lesson, could not as a matter of constitutional law outweigh the daughter's privacy interest or interest in health. There is, of course, nothing in the Utah statute which requires that parental input into the abortion decision, if any, be shaped by the best interests of the minor rather than by the independent views of the parents. See, State v. Koome, 84 Wash.2d at 908, 530 P.2d at 265 [father opposed minor daughter's abortion based on his belief that continuing her pregnancy would deter her from becoming pregnant in the future].

48/ This Court should not assume that the existence of a fundamental parental interest in the nurture of their children means that a state's mandatory notice to all parents of an impending abortion automatically furthers that interest.

only permissible parental interest which might theoretically be sufficiently weighty—that of safeguarding and promoting the health or welfare of the minor—is in an appreciable number of cases demonstrably not served by the requirement. 49/ If the actual impact of the means chosen by the state to encourage parental involvement is to harm a significant proportion of the pregnant minors involved, then the justification for intrusion upon the privacy right disappears, regardless of the nominal good intentions of the statute.

48/ cont'd
In effect, Utah's requirement is a conclusive presumption that all parents would want to be informed prior to an abortion, even if the requirement generates a significant risk that their daughter would refuse treatment rather than submitting to the mandatory notification. Many parents might well take the position that proper nurture of their adolescent daughters requires the state to leave the family alone in its decision-making, rather than subverting the emerging autonomy of the teenage young woman in so sensitive an area of development as her sexual identity, and rather than subjecting their daughters to significant risk of the physical and other harms indicated supra, at 38-41.

49/ Those minors whose parents, after an involuntary notification, do agree with their abortion decision, may or may not benefit from the requirement in terms of enhanced family solidarity. Parents, after all, may concede that abortion is in a daughter's best interest and still inflict the many other harms which courts and commentators have recognized to occur; see, e.g., Osofsky and Osofsky, Teenage Pregnancy:

C. The Physician's Best Medical Judgment is Not Enhanced by the Utah Statute.

Although couched in terms of assisting the physiciar to exercise medical judgment, the Utah statute is not even rationally related to achieving that goal, much less tailored narrowly to effectuate only that goal. The Code requires that all pregnant minors who desire abortions must permit their parents to be notified prior to the abortion being performed. However, the statute by its terms mandates a potentially empty act. A telephone call moments prior to performing the abortion would satisfy the terms of the law; nothing in the statute requires that the physician actually confer with the parents, or receive any information whatever from them. He could, consistent with the terms of the law, refuse to have any conversation whatever with them about the proposed abortion. Thus, the

49/ cont'd
Psychosocial Considerations, 21 Clin. Obstet. and Gynecol. 1161 (1978) [parental anger may be so intense as to drive a daughter to leave home]; Smith, The Role of the Grandmother in Adolescent Pregnancy and Parenting, 45 J. of School Health 278, 281 (1975) [some parents refuse to communicate further with daughters upon learning of a pregnancy]; Baird, 450 F.Supp. at 1001 ["Parents, physically or emotionally unwell, may be injured by the shock, thus causing the minor deep feelings of guilt. Some parents are child abusers; others at least may become actively hostile on such disclosure. . . .an appreciable number of parents are not supportive."].

notification requirement by its own terms compels nothing which advances the asserted goal of enhancing the physician's medical judgment.

Moreover, where a physician has required notification as the price of medical treatment, it seems likely that the trust essential for a successful physician-patient relationship will be impaired to some degree. It has long been recognized that a patient is not likely to bring to the therapeutic relationship the candor and trust essential for effective treatment if there is a fear that personal information will be disclosed to others, 50/ particularly if serious familial reproach is a likely consequence. 51/ This impaired trust potentially diminishes not only the immediate ability of the physician to deliver the highest quality medical care for the pregnancy, but also, in all likelihood, the willingness of a minor and her peers to seek a physician's care for other sex-related problems.

Additionally, a physician who believes that the minor's interests will be served by an abortion, and that serious harms would in fact result from notifying her parents, is rendered powerless by the statute to exercise any medical

50/ See, AJI-ABA Juvenile Justice Standards Project, Standards Relating to Rights of Minors, Commentary to Standard 4.2 at 55 (Tent. Draft, 1977) (hereinafter Rights of Minors). This volume was adopted by the American Bar Association in February, 1979.

51/ Id., Commentary to Standard 4.8, at 73.

judgment at all, because it is couched in mandatory terms. As amici will demonstrate below, vhere are far less intrusive means available to the state to further the interest in sound medical judgment, as well as the other potential purposes of the statute.

V. BECAUSE LESS INTRUSIVE MEANS EXIST FOR FURTHERING EACH INTEREST CONCEIVABLY ADVANCED BY THE NOTICE REQUIREMENT, THE UTAH STATUTE FAILS TO MEET THE CONSTITUTIONAL REQUIREMENT THAT IT BE NARROWLY TAILORED TO INTRUDE AS LITTLE AS POSSIBLE UPON THE EXERCISE OF FUNDAMENTAL RIGHTS.

A. Absent the Notice Requirement, Existing Law Provides Significant and Sufficient Safeguards To Ensure That Pregnant Minors Engage In Informed and Reasoned Decision-Making, and That A Physician Performing An Abortion Upon A Minor Exercises The Best Medical Judgment.

If the offending provision of Utah law did not exist, remaining provisions of the Utah code, together with common law principles of informed consent, physicians' professional ethics, and constitutional safeguards of parental rights, provide a baseline of protections which go very far indeed to ensure that a teenager's decision to have an abortion will be made in light of all considerations relevant to her physical and emotional health and future well-being.

Utah law mandates that a physician contemplating performing an abortion must take into account all of the broad-ranging considerations which this Court, in Doe v. Bolton, 410 U.S. 179, 193 (1973), has indicated are relevant to a woman's decision whether or not to terminate a pregnancy. Utah Code Ann. §76-7-304(1) (1978). Moreover, Utah law goes further, to require that physicians must inform the pregnant woman contemplating abortion about stages of fetal development, and about available adoption services in the locale. Utah Code Ann. §76-7-305(2) (1978). Additionally, Utah's generally-applicable informed consent statute adopts the emerging common-law approach of focusing on the informational needs of a person in the patient's position, rather than the custom of the physician, in determining what must be disclosed to a patient in order to elicit her informed consent. 52/ Utah Code Ann. §78-14-5 (1)(f) (1953).

Thus, Utah has ensured that a minor who may be uncertain about whether or not abortion is the best medical choice, or who may have moral or ethical reservations about abortion, will in the course of conferring with her physician be led to consider all relevant factors as part of

52/ See generally, Note, Restructuring Informed Consent: Legal Therapy for the Doctor-Patient Relationship, 79 Yale L.J. 1533, 1555-1560 (1970); Holder, The Minor's Right to Consent to Medical Treatment, 41 Conn. Med. 579, 581 (1977); T. Beauchamp and J. Childress, Principles of Biomedical Ethics at 70-77 (1979).

the abortion decision. These are significant protections for the welfare of pregnant minors, and ensure that their decisions will be made far more carefully with respect to an abortion than with respect to other forms of pregnancy-related care to which they are authorized by law to consent without any special counseling by the physician.

Additionally, of course, the medical profession itself is becoming increasingly sensitive to the central decision-making role of the patient in medical treatment; in recent years, the concept of information-sharing and communication as fundamental to truly informed consent has become incorporated into professional standards, ethical guidelines, and professional literature. 53/ These mandates are not going unheeded. For example, a recent study of the behavior of physicians in counseling pregnant patients seeking abortions revealed that more than 50% of those surveyed spent from thirty minutes to "as much time as needed" counseling

53/ See, e.g., American Hospital Association, A Patient's Bill of Rights §3 (1973), in 4 Encyclopedia of Bioethics at 1786 (1978); National Association of Children's Hospitals and Related Institutions, Pediatric Bill of Rights, Art. 4, 11, in 4 Encyclopedia of Bioethics at 1786-1787; Vaccarino, Consent, Informed Consent and the Consent Form, 298 N. Eng. J. Med. 455 (1978); Cassell, Informed Consent in the Therapeutic Relationship: Clinical Aspects, in 2 Encyclopedia of Bioethics at 767; Note, Restructuring Informed Consent: Legal Therapy for the Doctor-Patient Relationship, supra, at 1533.

individual patients regarding alternatives to abortion, and another 30% of the physicians surveyed spent from fifteen to thirty minutes individually counseling each patient. 54/ Nathanson and Becker, Physician Behavior as a Determinant of Utilization Patterns: The Case of Abortion, 68 Am.J.Pub. Health 1104, 1109, Table 4 (1978).

Moreover, Utah law protects not only the young woman who is able to engage in clear and rational decision-making about her pregnancy, but also the young woman with doubts or with impaired capacity, whether from immaturity or from some other cause. Some young women may exhibit uncertainty about whether or not they want an abortion; but since Utah's statutory delineation of the requisites for informed consent compels a physician to ensure that a patient is consenting intelligently and voluntarily before he/she can carry out a contemplated treatment with impunity, Utah Code Ann. §76-7-304 (1978); §78-14-5 (1953), it follows that an ethical and prudent practitioner would be unlikely to perform an abortion on a minor who appeared less than certain about wanting

54/ One court has explicitly recognized the considerable counseling role which a physician often plays with pregnant adolescents, concluding, "[t]hus, in the usual situation, the minor will not be acting without counsel or guidance." Wynn v. Carey, 582 F.2d at 1387 n. 22.

one, since she could not be regarded as intelligently and voluntarily consenting. 55/ Also, of course, if a minor requesting an abortion appeared in the physician's judgment incapable of exercising informed consent on her own behalf, whether because of extreme immaturity or for some other reason, Utah law, Utah Code Ann. §78-14-2(c) (1953), §76-7-305(1) (1978), together with ethical and common-law principles should lead the practitioner to refer the minor back to her parents, or to seek a court order providing the consent that the minor was thought incapable of giving. See, e.g., Holder, supra, at 582. Certainly no prudent physician would perform the abortion without some form of surrogate consent in such circumstances. This remains true even though the Utah code removes any presumption, conclusive or otherwise, that a minor per se lacks capacity to consent; for even where there is a presumption in favor of capacity to consent, an individual's actual inability to exercise informed consent ordinarily requires that someone else consent prior to treatment. See, e.g., Gauvey, Leviton, Shuger, & Sykes, Informed and Substitute Consent to Health Care Procedures: A Proposal for State Legislation, 15 Harv. J. Leg. 431, 438-44053, (1978). Even without the challenged notification requirement, therefore, existing law goes very far to encourage responsible decision-

55/ See generally, sources cited in note 53, supra.

making by minors about abortion, and ensures responsible exercise of medical judgment where abortion is concerned.

Moreover, if the notification requirement is found to be unconstitutional, the parental interest in guiding and rearing their children would still enjoy substantial protection under the federal constitution. Parents have a fundamental right to educate their children, to inculcate moral values and to share with their offspring their views about important issues such as abortion, pregnancy, sexuality, and childbirth, see Point IV, supra, at 42-44, and nothing in Utah law would or could prevent parents from discussing such matters with their children throughout childhood as frequently and as intensively as they wish to do so. 56/ This being so, amici submit, concerned parents have guaranteed to them the simplest of remedies for a fear that their teenage daughters will make decisions regarding abortion without parental

56/ At least one court has held that permitting minors to obtain contraceptives without notice to their parents does not violate the constitutional rights of parents to guide their children's upbringing. Doe v. Irwin, 48 U.S. L.W. 2587 (6th Cir. Feb. 26, 1980). While in that case it was the parents who were challenging a clinic's practice of providing contraceptives to minors without notifying their parents, the court found it significant that the clinic's practice did not preclude parents from involvement in their children's sexual and contraceptive activity; it simply did not require it.

guidance: they can communicate their values as persistently and persuasively as they like, whenever they like, without restriction.

In short, amici believe that in light of the significant protections which exist, apart from mandatory parental notification, to ensure responsible and informed decision-making by pregnant teenagers, responsible and informed exercise of medical judgment by physicians, and opportunity for parental guidance in the natural course of intrafamilial discussion and decision-making, it cannot be said that additional provisions which significantly burden minors' privacy rights are necessary to further those objectives.

B. The State of Utah Could, If It Wished, Enact More Narrowly Tailored Provisions To Enhance Its Legitimate And Significant Interests Relating To Teenage Abortion, With Far Less Intrusion Upon The Fundamental Privacy Rights of Pregnant Minors Who Seek Abortion Than is Caused By Mandatory Notification.

Blanket notification of parents in all cases of adolescent abortion is a sledge-hammer approach in a situation where this Court has ruled that "[t]he need to preserve the constitutional right and the unique nature of the abortion decision, especially when made by a minor, require a State to act with particular sensiti-

vity when it legislates to foster parental involvement in this matter." Bellotti II, 99 S.Ct. at 3047. If the Utah legislature considers that beyond the protections of existing law and professional standards of practice, additional measures are required to advance the interests involved in adolescent abortion, the state could, without unduly invading the protected privacy interests of pregnant minors, go to considerable lengths to further the legitimate goals of improved adolescent decision-making, parental involvement, and enhanced medical judgment, without imposing a self-defeating and intrusive blanket requirement of parental notice (and without the necessity for cumbersome and impractical alternatives such as judicial proceedings). 57/ (Text continues on page 58)

57/ While this Court has indicated in dicta in Bellotti II that speedy and confidential court proceedings might be a constitutionally adequate alternative to parental involvement, 99 S.Ct. at 3049-3050, such an alternative would be so impractical for the vast majority of pregnant minors that--as the concurring Justices Stevens, Brennan, Marshall, and Blackmun recognized--a court proceeding may well be a greater burden upon exercise of the privacy right than the mandatory parental involvement which the constitution forbids. Id., 99 S.Ct. at 3054. A young teenager, frightened about her pregnancy and feeling ashamed and powerless, is unlikely to be able to advocate effectively in court on her own behalf. See, Wynn v. Scott, 448 F.Supp. 997, 1004 (N.D. Ill. 1978), aff'd, Wynn v. Carey, 582 F.2d 1375 (7th Cir. 1978). Telling such a young woman she may take her case to court in lieu of involving her parents is equivalent in many

57/ cont'd.
cases to telling her she cannot have an abortion.

While an attorney could represent a minor effectively in such a proceeding, minors do not ordinarily have financial resources to hire attorneys, and for many pregnant minors, there will be no source of free or low-cost legal representation. Nearly three million poor people live in areas where there is no organized legal representation for the poor. Tate, Access to Justice, 65 A.B.A.J. 904 (1979). The former president of the Legal Services Corporation testified recently before Congress that "[t]he capacity of the Legal Services Corporation program is not expected to exceed two million legal matters per year through 1980. The total number of legal problems can be estimated to be at least three times the current capacity of Legal Services Corporation programs, perhaps much greater." Oversight on the Legal Services Corporation: Hearing Before the Subcomm. on Employment, Poverty, and Migratory Labor of the Senate Comm. on Labor and Human Resources, 96th Cong., 1st Sess. 101 (1979) (Statement of Thomas Erlich).

Even where legal services programs exist, many provide no services to children and adolescents. Abuse and Neglect of Children in Institutions, 1979: Hearings Before the Subcomm. on Child and Human Development of the Senate Comm. on Labor and Human Resources, 96th Cong., 1st Sess. 606-607 (1979) (Bull, Legal Services for Children and Youth: An Unmet Need). Others may incorrectly believe that they are not permitted by law to represent minors in such proceedings because of the proscription against legal services lawyers representing women in pursuit of non-therapeutic abortions, 42 U.S.C. §2996(f)(b)(8). The AJI-ABA Juvenile Justice Standards emphasize that "there continue to be jurisdictions in which few juveniles receive

57/ cont'd.
full representation . . . because an adequate pool of capable attorneys does not exist." AJI-ABA Juvenile Justice Standards Project, Standards Relating to Counsel for Private Parties, Commentary to Standard 2.1, at 49 (Tent. Draft, 1976). (This volume was adopted by the American Bar Association in February, 1979).

The practical difficulties, moreover, of maintaining actual confidentiality in small-town proceedings are great, and the necessity for disclosure of the minor's predicament--first to a lawyer, and then to court personnel--is itself likely to deter some minors from court proceedings. Finally, one must question what a judge, skilled as he or she may be in matters of law, could contribute to safeguarding the welfare of a pregnant minor capable of consenting to treatment, that could not be accomplished as well or better by consultation with her physician or other professionals. (The case of Stump v. Sparkman, 435 U.S. 349 (1978), rehearing denied, 436 U.S. 951 (1978), makes it abundantly clear that just as parents sometimes act contrary to the best interests of a minor with regard to her reproductive capacity, so may a judge, and with far greater impunity.) And as to threshold questions of competency for purposes of informed consent, such judgments are a daily element of the practice of medicine. See, e.g., Holder, supra, 41 Conn. Med. at 582. In short, amici urge that if this Court should determine that the Utah notification statute violates constitutional rights of pregnant minors, it not apply the Bellotti II dicta concerning court proceedings in such a way as to suggest that court proceedings would be an appropriate alternative to mandatory notification in this instance.

If the Utah legislature believes that additional safeguards are needed to ensure that decision-making by minors is informed and reasoned, it could easily require individual counseling for a specified time period by a social worker or other appropriate professional, or certification that the physician has personally counseled the minor individually for a specified time period, prior to performing an abortion (and even subsequently, if the state should deem that desirable). 58/

If, beyond this, the state of Utah wished to encourage parental notification for reasons relating either to enhancing the pregnant minor's decision-making process, 59/ or to the distinct and autonomous interest of parents themselves in control over the upbringing of their children apart from any beneficial impact

58/ While, as this Court has observed, there is no reason to assume that most physicians will act other than ethically and responsibly in their practice of medicine, Doe v. Bolton, 410 U.S. at 197-98, provisions such as amici suggest here would be relatively non-intrusive safeguards against minors being rushed impersonally through abortion clinics, if this were a concern of the Utah legislature. (See, Danforth, 428 U.S. at 91-92, n. 2.)

59/ Those minors who want an abortion, but whose own decision would change if they knew their parents would in fact support the pregnancy, and who would tolerate mandatory notification rather than forego legitimate medical care, are the only ones for whom mandatory notification would be likely to result in a more

upon the minor's welfare, 60/ the state could easily and effectively advance these interests by means which encourage parental notification without mandating it in all cases.

One feasible approach has been recommended in the AJI-ABA Juvenile Justice Standards. While either parental notification or parental consent is required under the Standards for nearly all other forms of medical care for minors, the Standards, like the Utah code, permit minors of any age to consent to medical care for treatment related to pregnancy, including abortion. Rights

59/ cont'd.
informed and thus better decision. No characteristic of this group warrants permitting its interests to extirpate the contrary interests of the many other minors who are seriously harmed by the notification requirement, particularly where less intrusive means could accomplish the same end. See Point IV, supra, at 38-41.

60/ The parental interest in control over upbringing of their children is fundamental and warrants solicitous judicial protection against intrusions by the state. But as amici have argued, supra, at 43-44, that aspect of the parental interest which is unrelated to concern for the child's best interest cannot constitute a significant enough interest to warrant diminution of the child's own fundamental rights. The state may attempt to further this autonomous parental interest, because while it is not significant enough to outweigh the minor's own interests, it is surely a legitimate state concern; but in so doing, it may not burden the minor's access to abortion by mandating notification where requiring it will harm the minor.

of Minors, Standard 4.8 A-3, at 70-71. The Standards provide that with respect to sex-related medical care, including pregnancy and abortion, the physician is in the first instance obliged to "seek and obtain the minor's permission to notify the parent." Id., Standard 4.2 B, at 53-54. "If the minor objects to notification of the parent, the physician providing treatment under this Standard should notify the parent of such treatment only if he or she concludes that failing to inform the parent would seriously jeopardize the health of the minor. . . ." Id., Standard 4.8 B, at 71. Moreover, the Standards set forth criteria for determining whether failure to inform the parent in fact would jeopardize the minor's health, including:

a. the impact that such notification could have on the course of treatment;
b. the medical considerations which require such notification;
c. the nature, basis, and strength of the minor's objections;
d. the extent to which parental involvement in the course of treatment is required or desirable.

Id., Standard 4.2 B.1., at 53-54.

Finally, where a physician concludes that notification of the parent is medically required, the Standards mandate that the physician

a. indicate the medical justifications in the minor-patient's file; and
b. inform the parent only after making all reasonable efforts to persuade the

minor to consent to notification of the parent. 61/

While this approach does involve some burden upon minors' privacy rights, the Standards do preserve the essentially medical nature of the abortion decision by reserving it to the pregnant minor and her physician, and do protect the integrity of the physician's clinical judgment; they strongly encourage both physician and minor to inform parents about not only an abortion, but also other pregnancy-related care, and they reserve the final decision about notification to the minor herself. The physician is permitted to override the minor's decision only if he/she has reasonable basis to believe that notification is essential for the minor's health. This approach is only minimally intrusive upon the physician-patient relationship, and upon the minor's privacy rights; those rights are burdened only where a physician believes the intrusion essential to protect the minor's health and well-being.

Amici do not suggest that the Standards would in any sense be needed to protect pregnant minors; in the view of amici, existing Utah law provides more than sufficient protection for the health and welfare of pregnant minors with

61/ In amici's view, protection of minors' privacy rights would additionally require that under no circumstances could the physician notify the parent without informing the minor of his/her intention of doing so.

respect to the decision about whether or not to bear a child. Nor do amici believe the Standards to be the only constitutionally permissible approach which a state might take if it nonetheless wished to encourage parental notification. But the Standards do make clear that more narrowly-tailored and less intrusive means exist for encouraging parental notification, means which respect the minor's privacy rights, further the physician-patient relationship, safeguard the minor's liberty interest in securing the most appropriate medical care, and further the legitimate state interests in protecting a minor's health and welfare, in encouraging involvement of parents in a minor's decisions relating to procreative choice, 62/ and in enhancing a physician's

62/ There is good reason to believe that persuasion would result in notification of parents in at least as many cases as the mandatory requirement would have. The only minors clearly benefitted more than they might be harmed by the notice requirement are those seeking abortion because of an incorrect belief that their parents would not be supportive of a pregnancy, and who will submit to mandatory notification rather than withdrawing from the physician-patient relationship. The increased information which would presumably become available to those minors might change their decision. However, since those minors are by definition not inalterably opposed to parent notification, it seems quite likely that they would agree to notice after experiencing the persuasion required by the Standards. Studies have

medical judgment about abortion. Where less intrusive means exist, the constitution does not permit the wholesale and irrational intrusion into certain unmarried minors' privacy rights which the insensitive and self-defeating Utah code provisions require.

62/ cont'd.
established that as many as 55% of teenagers using family planning clinics voluntarily involve their parents in the decision to seek contraception. Torres, Does Your Mother Know. . .? 10 Fam. Plan. Perspectives 280, 281 (1978). The percentage willing to disclose pregnancy and abortion may differ somewhat from the percentage willing to disclose sexual activity, but it is reasonable to suppose it would remain a substantial percentage, particularly if the physician were required to encourage such disclosure.

CONCLUSION

For all the foregoing reasons, amici respectfully urge this Court to reverse the judgment of the court below. 63/

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San Francisco, California.

Respectfully submitted,

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